STATE OF MICHIGAN

COURT OF APPEALS

ARENAC PROPERTY I, LLC, ARENAC PROPERTY II, LLC, and ARENAC PROPERTY III, LLC, Plaintiffs-Appellants,	UNPUBLISHED April 24, 2012
v	No. 303766 Arenac Circuit Court
DENNIS STAWOWY, in his capacity as ARENAC COUNTY TREASURER, and DENNIS STAWOWY, in his capacity as ARENAC COUNTY LAND BANK, Defendants-Appellees.	LC No. 10-011481-CH

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Plaintiffs, Arenac Property I, LLC, Arenac Property II, LLC, and Arenac Property III, LLC, appeal as of right from a trial court order granting summary disposition in favor of defendants, Arenac County Treasurer and Arenac County Land Bank, pursuant to MCR 2.116(C)(8) (failure to state a claim). We reverse, concluding that the trial court committed both legal and factual error in granting the motion. We also conclude that trial court abused its discretion in denying plaintiffs' motion to amend their complaint where plaintiffs alleged that defendants' conduct wrongfully or fraudulently deprived plaintiffs of their ability to participate in a public auction conducted pursuant to MCL 211.78m(2).[1]

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises from the Treasurer disqualifying plaintiffs from bidding in a tax foreclosure auction held pursuant to MCL 211.78m(2). Dennis Stawowy is both the Arenac County Treasurer and Chairman of the Land Bank.

[1] To the extent defendants argue that plaintiffs did not legally exist at the time of bidding, we decline to address the issue, as defendants have not seen fit to file a cross-appeal.

Arenac County acquired several properties via tax foreclosure proceedings and the Treasurer was appointed as the foreclosing governmental unit ("FGU"). On August 26, 2010, Stawowy held an auction to sell off various properties at the minimum bid (unpaid taxes plus foreclosure costs and fees); however, there were no bids on many of the properties. Afterward, the properties were bundled with other parcels and offered for sale as two groups – Lot 177 and Lot 198. The sale book distributed at the auction site stated that before bidding on Lot 177, a "prospective buyer must submit a plan to the County Treasurer's office by noon on October 29th, 2010 to address abatement issues for approval. No deeds will be issued until these terms are completed." For Lot 198, the sale book stated that in order to bid "the prospective purchaser must submit a plan to the County Treasurer's office by noon on October 29th, 2010 to address tank removal and clean up. Clean up is required within 30 days of auction, and a $500,000.00 performance bond must be posted. No deed will be issued prior to meeting this stipulation." Similarly, in the auction notice for Lot 177, Stawowy included the following pre-bidding qualification requirement for the auction: "Before bidding on this bundle of properties, the prospective buyer must submit a plan to the County Treasurer's Office by noon on October 29, 2010 to address abatement issues for approval. No deeds will be issued until these terms are completed."

Plaintiffs wished to bid on Lot 177. Though they were only interested in two of the 25 properties contained in Lot 177, they were willing "to take the bad with the good." Plaintiffs timely submitted a bid and accompanying plan for Lot 177 on October 29, 2010. Upon receipt of plaintiffs' bid and abatement plan, Stawowy also prepared and filed a bid and plan on behalf of the Land Bank. He then reviewed both plans and sought advice from Saginaw County Treasurer Marvin Hare, whom Stawowy believed to have more experience with selling tax foreclosed property. After consulting with Hare, Stawowy determined that neither submission, including his own, adequately addressed the abatement issues and rejected both plans. Accordingly, although the properties were put up for auction on October 30, 2010, they were not sold as there were no "qualified bidders." Thereafter, seven of the parcels were unbundled and individually transferred to the respective local municipalities in which the parcels were located. The remaining 20 parcels ultimately remained with the county and under the Treasurer's control.

Plaintiffs filed a complaint, arguing that Stawowy acted to insulate the Land Bank from a competitive bid. Plaintiffs alleged that the Land Bank lacked the assets to make a competitive bid and that Stawowy used no criteria to assess plaintiffs' plan and gave no reasons for rejecting the plan. Plaintiffs claimed that they were entitled to bid on the disputed property because they were able and willing to do so. Therefore, plaintiffs asked the court to either grant them title to the disputed property or hold a new auction. Plaintiffs filed a notice of lis pendens against part of Lot 177 prior to Stawowy transferring some of the lots by quit claim deed to local municipalities.

Through a Freedom of Information Act request, plaintiffs uncovered correspondence between Stawowy and Marty Spaulding, the auctioneer, wherein Spaulding instructed Stawowy on how to structure a noncompetitive auction to ensure that the Land Bank – not the plaintiffs – received the properties. In relevant part, Spaulding instructed Stawowy:

> You bundle all/some of your parcels. We deem them a 'nuisance' and require any prospective bidder . . . to submit a proposal for abatement of the nuisance . . . .

> Generally you will not get any proposals other than the one from your land bank. If you do, unless they are sufficient to abate the nuisance(s) you decline them. There is no stated criteria for being 'approvable'. Then your land bank is the only bidder (at $1) and you have cured the local unit issue AND kept it away from the bottom feeder/speculator buyers.

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that plaintiffs failed to state a valid claim because defendants were not legally obligated to accept bids on the disputed property. Specifically, defendants claimed that they had the right to cancel the sale at any time within 30 days of the sale because they unconditionally retained the right in their auction procedures to "reject any or all bids," which is permitted by statute in MCL 211.78m(2).

Plaintiffs responded by claiming that defendants did not have unlimited discretion to reject bids. Plaintiffs pointed to the email wherein Spaulding instructed Stawowy on how to structure a noncompetitive auction to ensure that the Land Bank received the properties. Plaintiffs asserted that the public auction was a sham that violated both the intent of the tax foreclosure auction statute and plaintiffs' due process rights. Plaintiffs also requested leave to amend their complaint to include new allegations that defendants intentionally deprived plaintiffs of their due process rights. Defendants denied that the auction was a sham, but they admitted that they wanted to keep the properties away from "bottom feeders" like plaintiffs because these buyers tend to abandon properties when they cannot rapidly "flip" them, resulting in additional foreclosure costs being placed on already hurting municipalities.[2]

After hearing oral arguments, the trial court ruled that MCL 211.78m(2) provided the Treasurer "unfettered discretion" to cancel the auction. The trial court granted defendants summary disposition pursuant to MCR 2.116(C)(8) for failure to state a claim upon which relief could be granted, based solely on the language of MCL 211.78m(2). The trial court denied plaintiffs' motion to amend their complaint because the amendment "would not be justified."

Plaintiffs now appeal as of right.

II. STANDARDS OF REVIEW

We review de novo a trial court's grant of summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). We review the record in the same manner as the trial court, giving no deference to its decision in order to determine whether the movant was entitled to judgment as a matter of law. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). A dispositive motion pursuant to MCR 2.116(C)(8) should only be granted when, based solely on the pleadings, "the claim is so manifestly unenforceable as a

[2] As Stawowy testified, the Land Bank was created in order to stop the "speculation process" in which outside private firms bought property for as little as $50 or $100 and then paid no taxes until the properties once again reverted to the county.

matter of law that no factual progression could possibly support recovery." *Dolan v Continental Airlines / Continental Express*, 454 Mich 373, 380; 563 NW2d 23 (1997).

We also review de novo questions of statutory construction. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). This Court's primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548–549; 685 NW2d 275 (2004). In so doing, the Court must begin with the language of the statute, ascertaining the intent that may reasonably be inferred from its language. *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007). It is axiomatic that the words contained in the statute provide the most reliable evidence of the Legislature's intent. *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 163; 744 NW2d 184 (2007). The Legislature is presumed to have intended the meaning it plainly expressed and clear statutory language must be enforced as written. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007); *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 72 (2007). If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. *Lash*, 479 Mich at 187; *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997). Only if a statute is ambiguous is judicial construction permitted. *Detroit City Council v Mayor of Detroit*, 283 Mich App 442, 449; 770 NW2d 117 (2009).

Whether a party's due process rights have been violated is a legal question that is reviewed de novo on appeal. *In re HRC*, 286 Mich App 444, 450; 781 NW2d 105 (2009).

Finally, we review for an abuse of discretion a trial court's denial of a motion to amend pleadings. MCR 2.118(A)(2); *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 666; 760 NW2d 565 (2008).

III. ANALYSIS

A. TAX FORECLOSURE AUCTION STATUTE

The foreclosed properties were to be auctioned according to statute. MCL 211.78m(2) states in relevant part:

> [T]he foreclosing governmental unit . . . shall hold at least 2 property sales at 1 or more convenient locations at which property foreclosed by the judgment entered under section 78k shall be sold by auction sale. . . . Except as provided in subsection (5), property shall be sold to the person bidding the highest amount above the minimum bid. . . . The foreclosing governmental unit may sell parcels individually or may offer 2 or more parcels for sale as a group. The minimum bid for a group of parcels shall equal the sum of the minimum bid for each parcel included in the group. The foreclosing governmental unit may adopt procedures governing the conduct of the sale and may cancel the sale prior to the issuance of a deed under this subsection if authorized under the procedures. . . . Not more than 30 days after the date of a sale under this subsection, the foreclosing governmental unit shall convey the property by deed to the person bidding the highest amount above the minimum bid. The deed shall vest fee simple title to the

> property in the person bidding the highest amount above the minimum bid, unless the foreclosing governmental unit discovers a defect in the foreclosure of the property under sections 78 to 78l.

MCL 211.78m(2) mandates that an auction and sale take place when a municipality does not exercise its right to purchase the property under MCL 211.78m(1)[3]. The intent of the legislature is clear in MCL 211.78(1), which provides:

> The legislature finds that there exists in this state a continuing need to strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expeditious return to productive use of property returned for delinquent taxes. . . .

The Legislature's clear intent was to improve the economy and protect the municipalities by creating a mechanism to efficiently dispose of foreclosed properties.

The trial court granted summary disposition pursuant to MCR 2.116(C)(8), finding that "pursuant to MCL 211.78m(2) and MCR 2.116(C)(8) Defendants had unfettered discretion to cancel the auction at the time it was cancelled." Defendants argue that the trial court properly granted their motion and that the language "may cancel the sale prior to the issuance of a deed . . . if authorized under the procedures" gave them unlimited discretion to cancel a sale or reject bids for any reason. Specifically, the 2010 Rules and Regulations devised for the sale clearly stated that "The County Treasurer reserves the right to pull parcels from the sale at any time prior to the auction."

Plaintiffs argue that the trial court improperly interpreted MCL 211.78m(2) as broadly conferring unlimited discretion on the Treasurer to cancel an auction for any reason. Plaintiffs maintain that the language "The deed shall vest . . . unless the [FGU] discovers a defect in the foreclosure" demonstrated the Legislature's intent to restrict an FGU's right to cancel a sale to situations where the prior property foreclosure was defective and deprived the owner of his or her due process rights.

We find that the trial court was operating under a fundamental misunderstanding of the true issue in the case. MCL 211.78m(2) grants broad authority to cancel a sale and defendants' rules of operation allowed them to withdraw parcels from sale at any time; however, *neither* of

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[3] MCL 211.78m(1) provides, in relevant part:

> If this state elects not to purchase the property under its right of first refusal, a city, village, or township may purchase for a public purpose any property located within that city, village, or township set forth in the judgment and subject to sale under this section by payment to the foreclosing governmental unit of the minimum bid. If a city, village, or township does not purchase that property, the county in which that property is located may purchase that property under this section by payment to the foreclosing governmental unit of the minimum bid.

these actions occurred in this case. The properties went to auction, but there was no sale. In their brief on appeal, defendants admit that "No one bid on the parcels and there was no sale." Nor were the parcels pulled from the auction. The trial court and defendants conflate "sale" with "auction." A competitive bidding process is mandated by MCL 211.78m(2), with the property going to the highest bidder. By declaring that there were no qualified bidders, plaintiffs assert that Stawowy ensured that a competitive bid process could not take place and effectively subverted the process mandated by the statute. Though not a model of clarity, plaintiffs' complaint alleged facts that defendants conspired to prevent plaintiffs from engaging and participating in a public auction. Therefore, because a sale never took place and because the parcels were never pulled, the trial court erred in relying on the cancellation provision in MCL 211.78m(2) when granting summary disposition in defendants' favor.

B. AMENDMENT OF PLAINTIFFS' COMPLAINT

Plaintiffs argue that the trial court abused its discretion in refusing to allow plaintiffs to amend their complaint to include allegations that defendants intentionally violated plaintiffs' due process rights. We agree.

MCR 2.118(A)(2) states: "[A] party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." MCR 2.116(I)(5) further provides that, when the court dismisses a party's claims pursuant to MCR 2.116(C)(8), "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." "[A]mendment is generally a matter of right, rather than grace." *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). An amendment is not justified, however, when the party has engaged in undue delay, acted in bad faith or with a dilatory motive, or repeatedly failed to cure pleading deficiencies despite prior opportunities to amend; when allowing an amendment would cause undue prejudice to the nonmoving party; or when such amendment would be futile. *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000). "An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998), quoting *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991). An amendment is also futile if it just restates allegations already made or introduces allegations that continue to fail to state a claim. *Lane*, 231 Mich App at 697.

Plaintiffs assert that the defendants violated their substantive and procedural due process rights by permitting Stawowy to effectively create a sham auction that effectively bypassed the tax foreclosure statutory requirements.

Due process ensures that sufficient legal safeguards are created to protect against deprivations of life, liberty, or property. US Const, Am 14 § 1; Const 1963, art 1 § 17; *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 213; 761 NW2d 293 (2008).

1. SUBSTANTIVE DUE PROCESS

Defendants argue that plaintiffs had no real property interest because they have "stated no Michigan case or statute that makes the opportunity to bid at a government auction a property right." Defendants cite *Oaktree Props LLC v Ingham Co Treasurer*, unpublished opinion per curiam of the Court of Appeals, issued May 13, 2008 (Docket No. 276168), for the proposition that a potential bidder has no legally protected interest in the properties.[4] In that case, a real estate developer brought an action for mandamus and declaratory and injunctive relief after the county treasurer transferred foreclosed property to the county, which then transferred them to the land bank. The developer argued that the treasurer violated its statutory duty to sell the properties at public auction under MCL 211.78m. *Id.* at slip op p 1. This Court declined to consider the merits of the claim based on the developer's lack of "injury in fact." *Id.* at 2. We stated:

> The plaintiff must demonstrate that it has a substantial interest that will be detrimentally affected in a manner different from the citizenry at large. Here, plaintiff had no legally protected interest in the properties. It was merely interested in buying them if they came available through auction. Plaintiff contends that the lost opportunity to buy the properties at issue gives it standing, but this loss of a speculative and uncertain opportunity does not affect plaintiff any differently than it affects the general public.

Oaktree is distinguishable from the case at bar. In *Oaktree*, the foreclosed property was never made available for public auction, whereas the property here was advertised for auction. By making the property available for auction, it was incumbent upon defendants to conduct a fair and open bidding process. Instead, plaintiffs are seeking to establish that defendants conspired to eliminate plaintiffs from participating in the auction. Moreover, unlike the plaintiffs in *Oaktree*, plaintiffs in this case have, in fact, demonstrated a substantial interest that will be detrimentally affected in a manner different from the citizenry at large. Here, if it is true that defendants wrongfully and covertly schemed to deprive plaintiffs of the opportunity to participate in the bidding process, plaintiffs *in particular* were targeted for exclusion. Plaintiffs had a protected interest in being members of the general public for purposes of engaging and participating in a public auction. We are satisfied, therefore, that plaintiffs have standing to pursue their due process claim.

We find further support in the context of "disappointed bidder" cases. When it comes to governmental contracts, a disappointed bidder has no protected interest in being awarded a contract. *Talbot Paving Co v Detroit*, 109 Mich 657, 661-662; 67 NW 979 (1896); however, "'[t]he exercise of discretion to accept or reject bids will only be controlled by the courts when necessary to prevent fraud, injustice or the violation of a trust.'" *Leavy v City of Jackson*, 247 Mich 447, 450; 226 NW 214 (1929), quoting 3 McQuillin, Municipal Corporations (2d ed), § 1340, p 919. Competitive bidding is designed for the benefit of taxpayers and not bidders. *Lasky v Bad Axe*, 352 Mich 272, 276; 89 NW2d 520 (1958). As discussed above, the clear intent

[4] We are not obligated to follow the majority in *Oaktree*, as it lacks precedential value. MCR 7.215(C)(1).

of drafting MCL 211.78m(2) was the "need to strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expeditious return to productive use of property returned for delinquent taxes." Failure to fairly conduct an auction after making the property available to the public would defeat that intent. Defendants' conclusion that bottom-feeding plaintiffs would likely fail to flip the properties and then abandon them, costing the county more money is cursory at best and without any evidence to support it.[5]

Finding that plaintiffs had a protected interest in a bidding process that would be open and fairly conducted, we now turn to defendants' alleged misconduct. "In disputes over municipal actions, the focus is on whether there was egregious or arbitrary governmental conduct." *Mettler Walloon LLC v Melrose Twp*, 281 Mich App 184, 197; 761 NW2d 293 (2008). "[E]ven when evaluating municipal conduct vis-à-vis a substantive due process claim, only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Id.* In fact, "[t]o sustain a substantive due process claim against municipal actors, the governmental conduct must be so arbitrary and capricious as to shock the conscience." *Id.* at 198. "The touchstone of due process is protection of the individual against arbitrary action of government . . . whether the fault lies in a denial of fundamental procedural fairness . . . or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Id.* quoting *Co of Sacramento v Lewis*, 523 US 833, 845; 118 S Ct 1708; 140 L Ed 2d 1043 (1998).

If plaintiffs are able to support their allegations, this was not simply an incorrect or ill-advised governmental decision. Instead the county treasurer, who was also the chairman of the Land Bank, is alleged to have schemed to ensure that plaintiffs were eliminated from the bidding process. Plaintiffs should be able to amend their complaint to allege they were denied due process, not just as the result of defendants' failure to follow procedure or statutory mandate, but as the result of egregious and arbitrary governmental conduct.

2. PROCEDURAL DUE PROCESS

To establish a procedural due process violation, plaintiffs must first demonstrate: (1) they had a protected life, liberty, or property interest that was infringed upon by defendants; and (2) the particular procedures used failed constitutional muster. *In re Vandalen*, 293 Mich App 120; ___ NW2d ___ (2011), slip op p 6. "Procedural due process serves as a limitation on governmental action and requires a government to institute safeguards in proceedings that might result in a deprivation of life, liberty, or property." *Mettler*, 281 Mich App at 213. "Logically, where a governmental actor has a personal pecuniary interest in the outcome of proceedings, he might not be an impartial decision maker." *Id.* Based on our discussion above, we find that Stawowy was not an objective decision-maker and that plaintiffs' procedural due process rights were also violated.

[5] We also note that there are other ways that defendants could have protected their interests, including a requirement that the successful bidder post a performance bond, as it did with Lot 198.

Plaintiffs' complaint is not a model of clarity. However, plaintiffs only became aware of the auctioneer's email after their original complaint was filed. The email, which instructs Stawowy on how to structure a noncompetitive auction to ensure that the Land Bank – not the plaintiffs – received the properties, supports plaintiffs' claim that Stawowy schemed to ensure that plaintiffs be excluded from the competitive bid process. There is evidence that defendants conspired to prevent plaintiffs from being members of the public for purposes of the tax foreclosure sale. Plaintiffs should be permitted to amend their complaint, especially when there may be evidence of fraud, injustice, or a violation of the public trust by Stawowy's intentional interference with the auction process. Plaintiffs had a legitimate expectancy that they would be able to bid at the auction and that their bid would be evaluated fairly and openly.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly